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Decision 04-07-039 July 8, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of GTE Corporation ("GTE") and Bell Atlantic Corporation ("Bell Atlantic") to Transfer Control of GTE's California Utility Subsidiaries to Bell Atlantic, Which Will Occur Indirectly as a Result of GTE's Merger with Bell Atlantic.	A.98-12-005 (Filed December 2, 1998)

DECISION MODIFYING DECISION 03-03-031 AND DENYING REHEARING

I. SUMMARY

This decision denies the rehearing applications of D.03-03-031 (the Decision) filed by Verizon California, Inc. (Verizon) and Southern California Edison (Edison). We affirm the interpretation set forth in D.03-03-031 that the intervenor compensation statute does not permit the reduction of an award on the basis of duplicative participation once the Commission has determined that the intervenor has made a substantial contribution to a Commission decision or order. The Decision is modified to emphasize the change in the Commission's prior interpretation of the statute; to include additional legislative history bearing on the intent of the statute; and to correct case citations and typographical errors.

II. FACTS/BACKGROUND

This proceeding has its genesis in the joint application of GTE Corporation (GTE) and Bell Atlantic Corporation (Bell Atlantic) for approval to transfer GTE's California utility subsidiaries to Bell Atlantic, as a result of the merger of GTE with Bell

Atlantic. The application was approved, with limited conditions and clarifications, in D.00-03-021.[1] Following thirteen days of evidentiary hearings, the Commission adopted D.00-03-021 on March 2, 2000. The Utility Reform Network (TURN), the Greenlining Institute (GL), Latino Issues Forum (LIF) (collectively, GL/LIF), and Public Advocates, Inc. (PA) each filed a Request for Compensation for substantial contributions to D.00-03-021.

On September 20, 2001, the Commission issued D.01-09-045, which resolved pending requests for awards of intervenor compensation filed by TURN, GL/LIF, and PA for substantial contributions to D.00-03-021. The Commission inadvertently omitted from D.01-09-045 its response to the comments it received on the Administrative Law Judge's (ALJ) draft decision concerning these requests.

On March 13, 2003, the Commission issued the Decision, which modified D.01-09-045 to include its response to comments on the ALJ's draft decision. The Commission concluded that there is no statutory basis for reducing an intervenor compensation award for an eligible participant who makes a substantial contribution to the adoption of a Commission decision. The Decision replaces D.01-09-045 entirely and overrules prior decisions that reduced awards on the basis of duplicative participation.

On April 17, 2003, Verizon timely filed an application for rehearing. Verizon alleges that the Decision commits the following errors: 1) relies on superseded reasoning to support the elimination of the duplication reduction; 2) violates due process by modifying a broad interpretation of the intervenor compensation law without adequate notice and an opportunity to be heard; 3) contravenes the plain language of the intervenor compensation statute; 4) is unlawful to the extent it denies legal effect to any part of the statute; 5) ignores Section 1801.3(f) which requires the Commission to take affirmative action to encourage efficiency in intervenor participation; and 6) objects to an across-the board rescission of the duplication penalty as being unnecessary in this case.

[1] The conditions and clarifications relate to the total amount of benefits allocated to ratepayers, distribution of those benefits, the funding of the Community Collaborative Agreement (CCA), preparation of service quality monitoring reports, and sharing of state level accounting cost information.

On the same date, Edison filed a Motion to Become a Party and File an Application for Rehearing. Edison seeks party status for the limited purpose of filing an application for rehearing. Edison echoed Verizon's assertion that duplicative participation should not be compensated. Edison specifically avers that the Legislature's express statements of intent in §1801.3 indicate that duplicative efforts should not be compensated. Edison also asserts that the Commission has the authority to reduce the amount of an intervenor compensation award.

TURN filed its Response to the Motion of Edison to Become a Party and File an Application for Rehearing on May 2, 2003. TURN objects to Edison's motion because Edison is neither a party to the proceeding, nor has it demonstrated any other basis on which it has a pecuniary interest in Verizon or its affiliates, as required by PU Code §1731(b).[2] In addition, TURN asserts that Edison does not meet the requirements of Rule 45(e) of the Commission's Rules of Practice and Procedure, which states that a motion must concisely state the facts and law supporting the motion.

On May 2, 2003, multiple parties filed responses to the rehearing applications, including responses by GL/LIF and TURN, as well as a joint response by the following organizations: Association of Mexican American Educators, California Association for Asian-Pacific Bilingual Education, California Association Bilingual Education, California Rural Indian Health Board, Filipino Civil Rights Advocates, Filipinos for Affirmative Action, Korean Youth and Community Center, National Council of La Raza, and the Southern Christian Leadership Conference (the Intervenors). PG&E filed a response in support of Verizon's rehearing application.

III. PROCEDURAL MATTER

Edison filed a Motion to Become a Party to this proceeding for the "limited purpose of filing an Application for Rehearing of Decision No. 03-03-031." (Edison Motion, p. 1.) Edison acknowledges that pursuant to §1731, its status as a non-party affects the right to apply for rehearing.[3]

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[2] Unless otherwise specified, all statutory citations are to the Public Utilities Code.

[3] Section 1731(b) provides in pertinent part that any party to the action or proceeding, or any

We grant Edison's Motion to Become a Party and File an Application for Rehearing. Because D.03-03-031 was not originally distributed to parties in the intervenor compensation proceeding (R.97-01-009), by special ruling they were invited to file comments and reply comments. Edison filed comments, and the Commission received and considered its late-filed comments on the Alternate Draft Decision. Because Edison filed comments at the Commission's invitation on the important duplication issue, we grant it party status and grants the motion to accept its application for rehearing for filing.

IV. DISCUSSION

The Decision modified D.01-09-045 by revising Section 6, adding Section 8, "Comments on Draft Decision," and by using revised hourly rates as adopted in D.02-05-011. More significantly, the Decision concluded that it is impermissible under the statutes governing intervenor compensation to reduce intervenor compensation awards on account of duplication once the Commission has determined that the participant made a "substantial contribution" in Commission proceedings.[4] This does not mean that the Decision guarantees full payment of all costs expended to participate in a proceeding. The Decision must adhere to the reasonable fees and costs provisions of the statute, as set forth in §1802(a)'s definition of "compensation." In ascertaining what is reasonable compensation for an intervenor, the Commission may reduce an award by taking many variables into consideration, such as the number of hours expended, the amount requested, and expert witness fees. However, compensation may not be reduced on account of duplication for work found, in the Commission's judgment, to constitute a "substantial contribution" to a Commission decision or order.

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stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing.

[4] Under §1802(i) of the statute, "substantial contribution" means that "in the judgment of the commission, the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer." A "customer" under §1802(b) is a participant representing consumers, customers, or subscribers of any electrical, gas, telephone, telegraph, or water corporation that is subject to the jurisdiction of the Commission.

This Decision marks a departure from prior decisions that permitted intervenor compensation to be reduced where a party's presentation was duplicative of another participant's contribution. The Commission has not committed legal error by re-evaluating its prior interpretation of a statute. An administrative agency may change its interpretation of a statute, rejecting an old construction and adopting a new one and the new interpretation is entitled to deference.[5]

On rehearing, we modify the Decision to emphasize the change in the Commission's prior interpretation of the statute; to include material legislative history bearing on the intent of the statute; and to correct case citations and typographical errors. The following legal and policy analysis further explains the basis for the Commission's reinterpretation of the statute and for bringing Commission decisions in line with the statute.

A. The Decision's Interpretation of the Intervenor Compensation Statute Comports with Intent of the Law and the Rules of Statutory Construction.

Both Verizon and Edison disagree with the Commission's interpretation of the intervenor compensation statute in D.03-03-031. Edison's rehearing application essentially mirrors Verizon's in stressing §1801.3 over §1803, and in urging that intervenor compensation awards should be reduced in cases of duplicative participation. In the analysis that follows, we examine those arguments in detail.

The fundamental task of statutory construction is to determine the intent of the legislators in order to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272; *People v. Peters* (1991) 52 Cal.3d 894, 898; *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572; *People v. Murphy* (2001) 25 Cal.4th 136, 142.) The first step in determining the Legislature's intent is to examine the actual words of the statute, giving them a plain and common sense meaning. (*Mercer v. Dept of Motor Vehicles* (1991) 53 Cal.3d 753, 763.) The literal meaning of a statute must be in accord with its purpose. (*Lakin v. Watkins Assoc. Industries* (1993) 6 Cal.4th 644, 658.) Statutes

[5] *Henning v. Welfare Comm.* (1988) 46 Cal.3d 1262, 1270, *citing NLRB v. Iron Workers* (1978) 434 U.S. 335, 351. An exception is where the agency's prior construction has been endorsed by

must be harmonized, both internally and with each other, to the extent possible. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.)

The Decision complies with the basic tenets of statutory construction, i.e., reading the statute as a whole and harmonizing potentially conflicting provisions, rather than considering language in isolation, as urged by Verizon. The California Supreme Court summed up the principles of statutory construction as follows:

> Our fundamental task… is to ascertain the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin our inquiry by examining the statute's words, giving them a plain and commonsense meaning. [Citation.] In doing so, however, we do not consider the statutory language "in isolation." [Citation.] Rather, we look to "the entire substance of the statute . . . in order to determine the scope and purpose of the provision...." [Citations.] That is, we construe the words in question " 'in context, keeping in mind the nature and obvious purpose of the statute....' [Citation.]" . … We must harmonize "the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole." [Citations.][6]

The purpose of the Intervenor Compensation Statute is "to provide compensation for reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs to public utility customers of participation or intervention in any proceeding of the [C]ommission." The legislative intent of the statute is set forth in section 1801.3:

> It is the intent of the Legislature that:
>
> (a) The provisions of this article shall apply to all formal proceedings of the commission involving electric, gas, water, and telephone utilities**.**
>
> (b) The provisions of this article shall be administered in a manner that encourages the effective and efficient participation of all groups that have a stake in the public utility regulation process.

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the courts.

[6] *People v. Mendoza* (2000) 23 Cal.4th 896, 907-908; rehearing denied.

> (c) The process for finding eligibility for intervenor compensation be streamlined, by simplifying the preliminary showing by an intervenor of issues, budget, and costs.
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> (d) Intervenors be compensated for making a substantial contribution to proceedings of the commission, as determined by the commission in its orders and decisions.
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> (e) Intervenor compensation be awarded to eligible intervenors in a timely manner, within a reasonable period after the intervenor has made the substantial contribution to a proceeding that is the basis for the compensation award.
>
> (f) This article shall be administered in a manner that avoids unproductive or unnecessary participation that duplicates the participation of similar interests otherwise adequately represented or participation that is not necessary for a fair determination of the proceeding.[7]

With the statute's purpose and intent in mind, we analyze Verizon's and Edison's claims.

B. The Decision Does Not Contravene the Plain Language of the Statute.

Verizon contends that the Decision contravenes the plain language of the intevenor compensation statute, which it asserts authorizes the Commission to reduce intervenor compensation awards on the basis of duplication of effort. (Verizon Rhg. App., p. 9) Verizon claims that the Commission denied the existence of this authority, "in part by suggesting that Section 1801.3(f) is 'not…[a] mandatory substantive provision' of the Statute. (Decision at p. 16.)" (Verizon Rhg. App., p. 9.)

[7] Added by Stats. 1992, Ch. 942, Sec. 2. Effective January 1, 1993.

The sentence to which Verizon refers is: "It [D.98-04-059] creates additional barriers to compensation awards that are not found in the mandatory substantive provisions of 1803 and 1802.5." (D.03-03-031, *mimeo*, p. 16.) This portion of the Decision does not address whether §1801.3 is mandatory.[8] But even if the language is mandatory, §1801.3(f) still provides the Commission with flexibility to award compensation for certain duplicative work and can be harmonized, as shown below, with §1802.5. In D.03-03-031, the Commission determined that D.98-04-059 and the Proposed Decision misread the plain language of the statute, including §1801.3(f) and the other intent and substantive provisions of the statute. The Commission further stated that this misreading creates additional barriers to compensation awards not found in the mandatory substantive provisions of §1803 and §1802.5.

Verizon rejects the Commission's rationale. Verizon attempts to "prove" that §1801.3(f) is mandatory in asserting that the use of "shall" and the fact that §1801.3(f) is used as a condition precedent in §1802.5 makes it a requirement. Verizon is incorrect because the Commission does not use §1801.3(f) as a condition precedent in applying §1802.5. Verizon also fails in this effort because the use of "shall" is not always mandatory.[9] Further, notwithstanding the use of "shall," §1801.3(f) gives the Commission the ability to administer the statute to discourage "unproductive or unnecessary participation" that duplicates interests "otherwise adequately represented." Thus, it is within the Commission's discretion to decide whether those interests are otherwise adequately represented, in determining whether an intervenor has made a substantial contribution.

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[8] Section 1801.3(f) is one of six expressions of legislative intent in the statute. It would be a grammatically awkward construction to say that intent is mandatory or not mandatory.

[9] Although the "shall/may" dichotomy is a familiar interpretive device, it is not a fixed rule of statutory construction. (*People v. Ledesma* (1997) 16 Cal.4th 90, citing 1A Sutherland, Statutory Construction (5th 3d. 1993), pp. 763-769.) "Shall" may be construed as mandatory or directory, as well as denote future operation. See also *Morris v. County of Marin* (1977) 18 Cal.3d 901, 908.

C. The Legislative History Supports the Commission's Interpretation of the Statute.

When the language of a statute is clear and unambiguous, there is no need for statutory construction. (*People v. Woodhead* (1987) 43 Cal.3d 1002,1007-1008.) Because the rehearing applicants claim that the Commission's interpretation of the statute conflicts with the plain language of §1801.3(f), it is necessary to review the legislative history, which should be considered in ascertaining legislative intent. (*California Mfrs. Assn. v. PUC* (1979) 24 Cal.3d 836, 844; see also *Mildred Lewis v. Karen Eleanor Ryan* (1976) 64 Cal.App.3d 330, 333-334.)

The legislative history in this case supports the Commission's conclusion that it is impermissible under the statutes governing intervenor compensation to reduce such awards on account of duplication. AB 1975, as introduced on March 8, 1991, included Section 1803(b)(1), which provided as follows:

> (b)(1) If part of the intervenor's presentation materially duplicates the contribution or presentation of any other party to the proceeding, except the commission, any compensation to which the intervenor would otherwise be entitled may be reduced proportionately.

In addition, §1803(b)(2) directed that "duplication" shall be narrowly construed. When AB 1975 was amended in 1992, the reduction provision did not appear at all. Section 1803 was amended to read:

> 1803. The commission shall award reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of preparation for and participation in a hearing or proceeding to any customer who complies with Section 1804 and satisfies both of the following requirements:
>
> (a) The customer's presentation makes a substantial contribution to the adoption, in whole or in part, of the commission's order or decision.
>
> (b) Participation or intervention without an award of fees or costs imposes a significant financial hardship.[10]

[10] Amended by Stats. 1992, Ch. 942, Sec. 4. Effective January 1, 1993.

It is presumed that by deleting an express provision of a statute, the Legislature intended a substantial change in the law. Under this principle, the Legislature's decision not to retain the duplication reduction provision implied an intent to abrogate that provision. (*People v. Dillon* (1983) 34 Cal.3d 441, 467, citing *People v. Valentine* (1946) 28 Cal.2d 121, 142.) Thus, the Decision's Conclusion of Law No. 7 that "[t]here is no statutory basis for applying a duplication penalty to reduce a compensation award for an eligible participant who makes a substantial contribution to adoption of a commission decision" is supported by the legislative history.

As the agency charged with the administration of the intervenor compensation statute, the Commission's interpretation of duplicative participation under the statute is entitled to great weight. (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 724.) The Commission's interpretation of the intervenor compensation statute was recently challenged in *Southern California Edison Company (Edison) v. PUC & The Utility Reform Network* (2004) 117 Cal.App.4th 1039. In that case, the Commission awarded TURN compensation for its intervention in a federal case on the basis of §1803 and §1802(a) of the statute. Edison sought review on the ground that TURN's federal work did not make a "substantial contribution" to the Commission decisions for which TURN sought compensation. The court disagreed, holding that nothing in the language of the intervenor compensation provisions limits compensation to instances where that review is sought in state court. The court gave deference to the Commission's interpretation of the statute because the Commission's interpretation should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language. (*Edison v. PUC & TURN, supra* at 1050.) Even when an agency adopts a new interpretation of a statute and rejects an old one, the court must continue to apply a deferential standard of review. (*NLRB v. Iron Workers, supra*, 434 U.S. 335 at 351.)

D. Verizon's Claim that the Commission Relied on Superseded Reasoning Lacks Merit.

Verizon claims that the Commission commits fundamental legal error by relying on superseded reasoning to support its elimination of the "duplication reduction,"

and this ground alone justifies rehearing. (Verizon Rhg. App., pp. 3-5.) We disagree. Verizon bases its position on the following quote from page 10 of D.03-03-031:

> [A]s the telecommunications and energy industries become increasingly competitive, the participation of customers, separate and apart from their representation through ORA or CSD, may not be necessary. We must begin to more critically assess, at the outset of a proceeding, whether the participation of these 'third-party' customers, separate and apart from their representation through ORA or CSD, is necessary, both in terms of non-duplication and in terms of a fair determination of the proceeding.[11]

D.03-03-031, at page 10, then states:

> This statement envisions a petering out of 3rd party consumer advocacy as regulation "withers away" and is replaced with competition. It is at odds with reality and the experience of California over the past several years. And its cavalier dismissal of active customer participation in Commission proceedings cannot be reconciled with other substantive and intent provisions of the statute, particularly with Pub. Util. Code section 1801.3(b)….

According to Verizon, based on this premise, the Decision overrules D.98-04-059 to the extent it espouses a duplication reduction. Verizon's conclusion is erroneous. In its quotation, Verizon omitted Section 1801.3(b), the specific portion of the intervenor compensation statute to which D.03-03-031 referred and relied upon:

> 1801.3(b)
>
> . . .
>
> The provisions of this article shall be administered in a manner that encourages the effective and efficient participation of all groups that have a stake in the public utility regulation process.[12]

By omitting Section 1801.3(b), Verizon leaves the impression that the premise for overruling D.98-04-059 is "the petering out of 3rd party consumer advocacy as regulation 'withers away' and is replaced with competition." Verizon's presentation of

[11] Verizon, on page 3 of its rehearing application, cited a portion of this quote which was taken from 79 CPUC2d 628 at 649, emphasis added (D.98-04-059).

[12] D.03-03-031, *mimeo*, p. 10, emphasis in original.

this issue is misleading. The Decision's inclusion of §1801.3(b) was essential in responding to what the Commission perceived as the past "cavalier dismissal of active customer participation in Commission proceedings." Section 1801.3(b) was quoted by the Commission as authority for its view that the intervenor compensation statute should be administered so as to encourage the effective and efficient participation of all groups that have a stake in the public utility regulation process. Verizon's approach would do just the opposite by imposing on intervenors the risk, in addition to being required to demonstrate a substantial contribution, of having their compensation discounted due to duplication for work that directly contributed to their "substantial contribution." This hardly encourages intervenor participation in Commission proceedings, which is at the core of legislative purpose and intent. We therefore reject Verizon's argument on this point.

E. The Decision Does Not Deny Legal Effect to Any Part of the Intervenor Compensation Statute.

Verizon asserts that the Decision "picks and chooses" between parts of the statute by denying certain words their meaning and by favoring certain parts of the statute over others. There is no merit to this contention. Indeed, the Commission has frowned upon selecting one section of a statute over another, and so noted it in D.99-02-039 at 14 (85 CPUC2d 59, 67), which modifies D.98-04-059 (79 CPUC2d 628). We recognize that statutes must be read as a whole and that we "do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*People v. Thomas* (1992) 4 Cal.4th 206, 210; rehearing denied by *People v. Thomas*, 1993 Cal. LEXIS 571.) In this case, we viewed the statute as a whole, giving effect to all parts, in interpreting the intervenor compensation statute.

The claims by Verizon that the Decision denied legal effect to §1801.3(f), §1802(a), and §1804(b)(2) are groundless. Verizon charges that the Decision merges the meaning of "substantial contribution," as set forth in §1801.3(d), §1802.5, and §1803(a),

with that of "unproductive or unnecessary participation," as set forth in §1801.3(f).[13] As a result, Verizon argues, the "unproductive or unnecessary" language of §1801.3(f) is rendered meaningless. Verizon is incorrect. What Verizon considers "merging" the meaning of "substantive contribution" with "unproductive or unnecessary" participation is our compliance with the rule of statutory construction that various parts of the statute should be harmonized. As a corollary, Verizon urges that the requirements of "substantial contribution" and avoiding "unproductive or unnecessary participation" should be read separately. (See Verizon Rhg. App., at pp. 10-11.) This would have us ignore another basic statutory tenet that words should not be read in isolation and statutes should be read as a whole.

1. The Decision Correctly Interpreted Section 1801.3(f).

Verizon contends that the Decision interprets the "substantial contribution" requirement and the legislative intent provision in §1801.3(f) "in a way that effectively disavows the Commission of its obligation in Section 1801.3(f) to avoid unproductive or unnecessary duplication of effort." (Verizon Rhg. App., p. 11.) Rather than disavowing or negating §1801.3(f), the Decision placed it in the proper context as an integral part of the process of determining whether a customer's presentation meets the "substantial contribution" test, as required by §1803. Pursuant to the rules of statutory construction, §1801.3(f) must be harmonized with §1803, and that is what the Decision does.

A reading of the statute as a whole, including a careful reading of

[13] The intent provisions of 1801.3 have already been laid out. Briefly stated, §1802.5 permits compensation if a customer materially supplements, complements, or contributes to the participation of another party.

§1801.3(f), does not necessarily lead to the conclusion that because a party's participation duplicates or overlaps with that of some other party, there should be a reduction in compensation. The statute seeks to avoid only duplicative participation that is unproductive or unnecessary, not simply duplicative participation.[14] In our view, any participation that results in a substantial contribution by definition is not unproductive or unnecessary because we must find, in our judgment, that the participation "has substantially assisted the commission in the making of its order or decision." (Section 1802(h).).

Section 1801.3(f), which both rehearing applicants seek to elevate over all other sections of the statute, delineates but one aspect of legislative intent, and that is that the article shall be administered in a manner that avoids unproductive or unnecessary participation that duplicates the participation of similar interests otherwise adequately represented or participation that is not necessary for a fair determination of the proceeding. This section must be harmonized or balanced with the purposes of the statute, found in §1801.3(d), and §1803. As noted above, the purpose of the statute is to compensate intervenors for reasonable advocate's and expert witness fees, and other reasonable costs. Section 1801(d) requires intervenors to be compensated for making a substantial contribution to Commission proceedings. This intent is reflected in §1803, which states that the commission "shall award reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of preparation for and participation in a hearing or proceeding to any customer who complies with Section 1804" and makes a substantial contribution, without which an award of fees or costs would impose a significant hardship. As noted in the Decision, the statute anticipates customer activity in Commission proceedings that overlaps with the activity of others with common interests, as evidenced by §1802.5. Thus, the Decision's statement that "[t]he Legislature provided for multifarious, overlapping and duplicative participation by customers in all manner of

[14] The Commission correctly recognizes that pursuant to 1801.3(f), two types of participation should be avoided: (1) unproductive or unnecessary participation that duplicates…[or]; (2) participation not necessary for a fair determination, thus rejecting the three standards for program administration set forth in D.98-04-059 (79 CPUC2d 628, 649-650). (See Decision, *mimeo*, p. 15.)

Commission proceedings" is on point.[15] Verizon's claim that this statement is a contradiction of §1801.3(f) is without merit.

The Commission's interpretation seeks to remove barriers to compensation, consistent with the statute. It gives effect to the core purpose and intent of the intervenor compensation law, as provided by §1801 and §1803:

> The evident purpose is to "encourage" participation by groups that might be broadly aligned around common positions and proposals, but who have distinct constituencies or distinct abilities to contribute to the conduct of a proceeding at the commission. The only requirement is that they have a stake in the process – 1801.3(b) – and that they make a substantial contribution in the judgment of the commission – 1801.3(d).[16]

We therefore conclude that a customer's presentation is compensable if the customer makes a substantial contribution, consistent with its definition in §1802(i). This is in keeping with the statute's purpose to encourage participation by groups that have a stake in public utility regulation. As the legislative history demonstrates, the Legislature did not intend for compensation to be reduced on account of duplication.

Once a participant's contribution is judged to be substantial by the Commission, where is the line to be drawn? Verizon would have the Commission decide that one participant's contribution is more substantial than another's. The statute does not provide for such an outcome. It does not provide for degrees of what constitutes a substantial contribution. This does not mean that the Decision guarantees full payment of all costs expended to participate in a proceeding. The Commission may take many variables into consideration in ascertaining what is reasonable compensation, such as the number of hours expended, the amount requested, and expert witness fees.[17]

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[15] Decision, *mimeo*, p. 13.

[16] Decision, *mimeo* at p. 14.

[17] For example, in *Sawaya v. MCI Telecom Corp.* (2002) Cal.PUC LEXIS 443 (D.02-08-012), the Commission awarded $3,148.29 to George Sawaya for intervenor compensation based on his substantial contribution to D.01-11-017. There was a reduction in the compensation award, but the reduction was not based on duplication of effort. The reasons were based on the number of hours the intervenor claimed and difficulty in quantifying the value contributed by the intervenor.

However, intervenor compensation may not be reduced on account of duplication once the Commission has determined that a substantial contribution has been made by the intervenor.

2. The Commission Did Not Deny Legal Effect to Section 1802(a).

Verizon asserts that the Decision denied legal effect to §1802(a) by not providing for reduced or partial compensation. Verizon is incorrect. There is nothing in the plain language of this statute that requires the Commission to reduce an intervenor's compensation based on duplication of effort. Section 1802(a) provides as follows:

> (a) "Compensation" means payment for all or part, as determined by the commission, of reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of preparation for and participation in a proceeding, and includes the fees and costs of obtaining judicial review, if any.[18]

By this section, the Legislature intended that "compensation" cover all or part of reasonable fees and costs in preparing for and participating in a Commission proceeding. The Commission gave full effect to this provision when it adjusted the compensation requests in this proceeding. Those adjustments, however, were not based on duplicative participation; they were based on the fees and costs sought by the intervenor.[19] For example, the Commission adjusted PA's request because it did not clearly identify time spent on travel and fee petition preparation, and incorrectly billed at full hourly rates. The Decision correctly identified the hours and the billing rate and awarded compensation on that basis. (See Decision, Finding of Fact No. 11.) Similarly, the Decision adjusted compensation for GL/LIF in computing expenses for airfare and

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[18] Section 1802(a), amended by Stats. 1993, Ch. 589, Sec. 135. Effective January 1, 1994.

[19] This is in line with section §1802(a) and was recognized by the court in *Southern California Edison Co. v. PUC, supra*, which stated that "before making an award, the PUC must first conclude that the fees and costs for which compensation is sought were 'reasonable.' (§1802, subd. (a.)) Therefore, where a customer's presentation …adds nothing to claims already presented, the PUC could conclude the costs incurred in connection with that presentation were not reasonable." *Southern California Edison Co. v. PUC, supra,* 117 Cal.App.4th 1039, 1052, n. 13. However, by definition, an intervenor making a substantial contribution must add something that substantially assists the Commission in the making of an order or decision. Thus, if the Commission has found that the intervenor made a substantial contribution under 1802.5, then it must award full compensation, whether or not duplicative, subject only to whether the fees and costs are reasonable.

travel and a discrepancy of $70.13 in the Errata. (See Decision, Finding of Fact No. 14.) The Commission is also cognizant of §1806, which provides for a reduced award if the request seeks amounts in excess of market rates paid to persons of comparable training and experience who offer similar services. Verizon would have had the Decision reduce compensation based solely on duplication.

Reducing compensation on the basis of duplicative participation contravenes the legislative history of the statute, as previously noted. In awarding such compensation, the Decision also complies with Section 1802(h) which provides in pertinent part that:

> Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation.[20]

Section 1802(h) permits the Commission to award the full amount of reasonable fees and costs incurred even where the Commission adopts a customer's recommendations in part. This is confirmed by §1802.5, which provides that "[p]articipation by a customer that materially supplements, complements, or contributes to the presentation of another party, including the commission staff, may be fully eligible for compensation if the participation makes a substantial contribution to a commission order or decision, consistent with Section 1801.3." Section 1802.5 is a testament to the Legislature's intent that overlapping testimony be compensated if the Commission determined that a substantial contribution was made. When the Legislature wanted to reduce compensation due to duplication, it explicitly said so, as the legislative history demonstrates.

[20] Section 1802(h), amended by Stats. 1993, Ch. 589, Sec. 135. Effective January 1, 1994.

3. Verizon Magnifies Section 1804(b)(2) Beyond the Statutory Language in the Intervenor Compensation Law.

Verizon asserts that the Decision denies legal effect to §1804(b)(2). Section 1804(b)(2) provides as follows:

> (2) The administrative law judge may, in any event, issue a ruling addressing issues raised by the notice of intent to claim compensation. The ruling may point out similar positions, areas of potential duplication in showings, unrealistic expectation for compensation, and any other matter that may affect the customer's ultimate claim for compensation. Failure of the ruling to point out similar positions or potential duplication or any other potential impact on the ultimate claim for compensation shall not imply approval of any claim for compensation. A finding of significant hardship in no way ensures compensation. Similarly, the failure of the customer to identify a specific issue in the notice of intent or to precisely estimate potential compensation shall not preclude an award of reasonable compensation if a substantial contribution is made.[21]

Verizon asserts that this section acknowledges the Commission's authority to reduce intervenor compensation awards on the basis of an ALJ's finding of duplication and insists that the reference to "any other matter that may affect the customer's ultimate claim for compensation" must be negative.[22]

As the Decision correctly concluded, §1804(b)(2) is a procedural provision that does not create additional substantive conditions above and beyond what is in PU Code §1803. (Decision, *mimeo*, p. 18.) Section 1803(a) is mandatory in requiring that the Commission "shall award" reasonable fees and costs incurred in enabling the customer to make a "substantial contribution to the adoption, in whole or in part, of the commission's order or decision." In contrast, §1804(b)(2) is advisory except for the

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[21] Section 1804(h)(2), amended by Stats. 1992, Ch. 942, Sec. 5. Effective January 1, 1993.

[22] "Affect" means to act upon, to produce an effect upon (which may be detrimental or not), or to make an impression upon. Some synonyms are: influence, touch, impress, strike, or sway. See *Webster's Third New International Dictionary* (unabridged) (1986) by Merriam-Webster, Inc., p. 35. Using "affect" as negative is not common usage since "affect" may also be positive. Verizon suggests that its interpretation of "affect" as negative is common sense, but that is not what the dictionary says. Verizon is wrong.

"significant financial hardship" determination (1804(b)(1). In addition, it is permissive. The ALJ is not required to issue such a ruling. Such a ruling, if issued, could call attention to duplication as a potential difficulty in establishing a substantial contribution. However, once the Commission determines that a substantial contribution has been made, that customer is entitled to reasonable advocate's fees, pursuant to §1803. Contrary to Verizon's contentions, there is nothing in §1804(c) that makes it mandatory for the ALJ to issue the ruling set forth in §1804(b)(2). We concur with the Decision's reasoning that the ALJ ruling "would accomplish what the legislature said it intended in 1801.3(b): to make the parties' participation more effective and efficient by pointing out synergies and collaborative opportunities that would permit them to reduce their costs while remaining effective in making the presentation that will assist the Commission – i.e., make the substantial contribution."[23] We conclude that Verizon's interpretation of §1804(b)(2) is not supported by the plain language of the statute.

F. DUE PROCESS

Verizon claims the Decision violates due process because it did not provide parties to the generic intervenor compensation docket adequate notice and an opportunity to be heard on the substantial changes proposed in the Commissioner Wood's Alternate Draft. It further complains that the notice in this docket was inferior to that provided in the generic intervenor compensation docket, and due process was not satisfied in a docket that was last "substantially" active almost five years ago, and where service by mail provided less than a week to comment. There is no merit to Verizon's claim that it was denied due process. Verizon's own participation in this docket shows that it, as well as other parties in the generic intervenor compensation docket, were given adequate notice and the opportunity to be heard.

On November 25, 2002, in this docket, the Alternate Draft Decision of Commissioner Wood was distributed for comments. Comments were due by December 9, 2002 and reply comments, by December 11, 2002. Comments were filed by Verizon, TURN, the "Intervenors," and by GL/LIF. The "Intervenors" also filed reply comments.

[23] Decision, *mimeo*, p. 20, n. 17.

On January 24, 2003, the Alternate Draft Decision was re-issued for comment and served by mail in the generic intervenor compensation docket (R.97-01-009/I.97-01-010) to provide parties in that docket an opportunity to comment. Comments were due ten days later on February 3, 2003, and reply comments on February 7, 2003. Verizon again timely filed comments to Commissioner Woods' Alternate. The "Intervenors" filed comments on February 6, 2003; and TURN on February 7, 2003. GL/LIF filed reply comments on February 10, 2003. Subsequently, Edison filed a Motion to Submit Late-Filed Comments on February 18, 2003. PG&E also filed a Motion to Extend Time for Comment on February 24, 2003. The Commission waived the deadline for Edison and PG&E and received and considered their late-filed comments.

Verizon asserted its due process claims not only on its behalf, but also on behalf of others. It expressed concern that in addition to the parties active in the GTE/Bell Atlantic merger proceeding, only two other parties, Edison and PG&E, filed comments. Verizon's due process claim is without merit because the parties to the generic intervenor compensation proceeding were given an opportunity to comment in this proceeding. Therefore, to the extent there were any notice deficiencies, they were cured by giving all parties to the generic intervenor compensation proceeding notice and an opportunity to be heard. Moreover, notwithstanding Verizon's concerns for others' due process rights, it failed to establish that it was denied due process, or that it had standing to raise that claim on behalf of others.

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V. CONCLUSION

For all of the above reasons, rehearing is denied. However, we modify the decision to emphasize the significant change in the Commission's prior interpretation of the statute, and to include additional legislative history bearing on the intent of the statute. We also correct case citations and typographical errors.

Therefore, **IT IS ORDERED that**:

1. The title page on the cover sheet of the Decision should read as follows:

   Opinion Modifying Decision 01-09-045

2. Page 2, first full paragraph, line 7, after the sentence beginning with "In this revised decision," the following should be added:

   > The adjustment of hourly rates is done pursuant to D.02-05-011, which directed that the hourly rates adopted in D.01-09-045 be modified as appropriate to utilize the hourly rates adopted in D.02-05-011 for 1998, and subsequent years. There is no change to the amount of the award or the reasoning supporting it for TURN.

3. Page 2, first full paragraph, line 7, beginning with "Through inadvertence" should be deleted and replaced by the following new paragraph:

   > We conclude that the reduction of an intervenor compensation award on account of duplication to participants that have been judged by the Commission to have made a substantial contribution to a Commission proceeding is not permissible under the intervenor compensation statutes. This conclusion represents a change in our prior interpretation of the statute. Therefore, to the extent that D.98-04-059 (79 CPUC2d 628), as modified by D.99-02-039 (85 CPUC2d 59), and other decisions that ordered a reduction in intervenor compensation on account of duplication conflict with this Decision, they are overruled. Our reasoning is laid out in a revised Section 6. Through inadvertence, we failed to include in D.01-09-045 our response to the comments we received on the Administrative Law Judge's (ALJ)

> Draft Decision. Therefore, we modify D.01-09-045 include a revised Section 6; to add Section 8, "Comments on Draft Decision;" and to revise the hourly rates.

4. Page 12, insert the following paragraph immediately before the paragraph beginning "AB 1975 added":

> The 1992 Amendments made substantial changes to the intervenor compensation law applicable to the Commission. Additions and deletions to the law were enacted. On the issue of duplication, the Amendments deleted an express provision that had once provided for a proportionate reduction in a compensation award if part of the intervenor's presentation materially duplicates the contribution or presentation of any other party to the proceeding. (See AB 1975, Chap. 942, Sec. 2, 1991-92 Reg. Session.) After the 1992 Amendments, the duplication reduction provision no longer appeared. Instead, §1803 requires the Commission to award reasonable fees and costs to any customer who makes a substantial contribution to a Commission order or decision, which without an award of fees would impose a significant financial hardship.
>
> By deleting an express provision of the statute, it is presumed that the Legislature intended a substantial change in the law. Using this principle, we conclude that there is an implied intent to rescind the express provision reducing an award due to duplication. (*People v. Dillon* (1983) 34 Cal.3d 441, 467, citing *People v. Valentine* (1946) 28 Cal.2d 121, 142.)

5. Page 16, first full paragraph, line 2, the date of People ex rel. Wood v. Sands, 102 C.12 should be 1894, not 1893.

6. Page 16, first full paragraph, line 3, should give the full citation of Trafficschoolonline, Inc. v. Superior Court, as follows:

> Trafficschoolonline, Inc. v. Superior Court, 89 Cal.App.4th 222 (2001), appealed in Trafficschoolonline, Inc. v. Clarke, 112 Cal.App.4th 736 (2003).

7. Page 18, first paragraph, last sentence should be modified as follows:

> However, this procedural provision cannot be read to impliedly create additional substantive conditions for an award over and above what is in Pub. Util. Code section 1803. The substantive standard in §1803 for a compensation award is limited to a customer who makes a substantial contribution. A concurrent requirement is that the customer's participation would impose a significant financial hardship without an award of fees or costs.

8. Page 39, line 4, delete "of arguments" so that the sentence reads as follows:

> We waive the deadline for filing comments and receive the Comments of Edison and the arguments of PG&E.

9. The following will be added as Finding of Fact No. 6 and the remaining Findings shall be renumbered sequentially:

> The legislative history of §1803 supports the Decision's interpretation that the intervenor compensation law provides no statutory basis for reducing, on account of duplication, a compensation award to an eligible participant determined by the Commission to have made a substantial contribution to a Commission decision or order.

10. Conclusion of Law No. 6 should read as follows:

> D.88-12-085, D.91-12-055, D.93-06-022, D.96-06-029 and D.98-04-059 are overruled to the extent described in Section 6 of this Decision.

11. Conclusion of Law No. 8 should read as follows:

> This revised decision replaces D.01-09-045 to the extent that it is inconsistent with this decision, and does not allow the reduction of an intervenor compensation award on account of duplication.

12. The following should be added as Conclusion of Law No. 9 and Conclusion of Law No. 9 should be re-numbered as the next number in sequence:

> The legislative history of a statute should be considered in ascertaining legislative intent.

13. The Motion of Edison to Become a Party and File an Application for Rehearing is granted.

14. The rehearing applications of D.03-03-031 filed by Verizon California and Edison are denied.

15. In all other respects, D.03-03-031, as modified, is denied.

This order is effective today.

Dated July 8, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners